IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2608 OF 2005

Namdeo @ Ram Krushna Khot ..Applicant

Vs.

The State of Maharashtra ..Respondent

None for the applicant

Mr.D.S.Mhaispurkar, A.P.P. for the state

CORAM : J.N.PATEL &
SMT.ROSHAN S.DALVI, JJ.

DATED : 5TH OCTOBER, 2006

ORAL JUDGEMENT (PER J.N.PATEL, J):

1. Heard.

2. Rule, returnable forthwith.

2. Ld.A.P.P. waives service.

3. This is an application filed by the convict seeking set off under section 428 of the Cr.P.C. which was not granted to him at the time this court disposed of the appeal preferred by the State of

Maharashtra against the applicant as well as other co-accused. The petitioner along with the co-accused was tried on a charge of having committed offence under section 302 r/w s.34 of the Indian Penal Code by the Sessions Judge, Kolhapur. In Sessions Case No.106 of 1986, the learned Trial Court by judgement and order dt.3.9.87 acquitted all the accused including the petitioner. The State being aggrieved with the decision of the Sessions Judge preferred an appeal before this court which was registered as appeal no.31 of 1998. On 7.8.03 this court allowed the appeal preferred by the State of Maharashtra and the operative part of the order reads as under:

> "i) In the result, therefore appeal succeeds and is allowed.
>
> ii) The order of acquittal is set aside. Instead we convict the accused under section 302 read with section 34 of Indian Penal Code.
>
> iii) We sentence them to suffer rigorous

imprisonment for life.

iv) We direct the police concerned to take the accused in custody to undergo the sentence awarded as aforesaid 30 days after the receipt of this order. Their bail bond stands cancelled."

4. It appears that at the time the state preferred the appeal before this court which was taken up for hearing and came to be disposed of by the aforesaid judgement and order, the respondent no.1 i.e. the original accused no.1, Krishna Naga Khot was dead and, therefore, the appeal against him stood abated and by judgment and order only respondent nos.2 and 3 who were the original accused nos.2 and 3 came to be convicted. In the operative part of the judgment, as there is no mention of the fact that the accused who are convicted are given set off under section 428 of the Cr.P.C., this application has been filed by the accused through Jail.

5. Initially the matter was placed before the

learned single Judge who on examination of the matter found that this application will have to be placed before the same bench for speaking to the minutes in his order dt.7.12.05 and the matter was placed before the bench which decided the appeal. The bench passed the order on 26.7.06 as under:

> "The question involved in this case is a substantial question of law requiring detailed argument. There is no reported judgement on the issue. It is not necessary that this aspect is considered by the Bench which maintained conviction only. Regular Bench taking up criminal appeals can hear the matter. List the application before the appropriate Bench for directions regarding hearing." This is how the matter is placed before us.

6. The learned A.P.P. pointed out to us that the period during which the applicant was in detention commenced from the date of his arrest which is 14.7.86 till he came to be acquitted i.e.3.9.87 and that if at all this court considers

that the applicant is entitled for set off, it may pass appropriate orders.

7. In our view, though the Division Bench of this court on 26.7.06 observed that the question involved in this case is a substantial question of law requiring detailed argument and also expressed that there is no reported judgement on this issue, we are not in a position to address to the substantial question of law involved in this case as the bench has not framed any substantial question of law which it felt required detailed argument. We do not want to express any opinion in respect of the observation of the bench that there is no reported judgement on the issue.

8. We find that it is a settled law that the convict is entitled to set off of the period of detention undergone as under-trial prisoner which is evident from the plain reading of s.428 of the Cr.P.C. which is reproduced for the purpose of reference.

"Period of detention undergone by the accused to be set off against the sentence of imprisonment

Where an accused person has, on conviction, been sentenced to imprisonment for a term (not being imprisonment in default of payment of fine,) the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction be restricted to be remainder, if any, of the term of imprisonment imposed on him."

. The conditions for the applications of the sections are that the accused person has been convicted and sentenced (whether before or after

coming into force of this new section) to imprisonment for a term which includes imprisonment for life as held in the case of **Bhagirath v. Delhi Admn. reported in 1985 SC 1050.** Secondly, that sentence is still running. Thirdly, such imprisonment must not have been awarded in default of payment of fine. Fourthly, he has undergone detention as an under-trial prisoner for a period of time, before the date of such conviction. Fifthly, the detention for investigation / inquiry / trial must relate to the same case i.e. the case where the claim for remission on account of pre-trial detention is made and lastly, the pre-trial detention must be in relation to investigation / inquiry / trial of the same case. If the foregoing conditions are satisfied, the accused shall have to undergo only the balance of his sentence after deducting the period of under-trial detention. It is a settled law that the section is absolute in its mandate. It provides for set-off of the pre-conviction detention against the term of imprisonment on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into

account by the Court while imposing the term of imprisonment. The section does not say that the set-off will not be available where the Court has already taken account of the pre-conviction detention while imposing the sentence.

. The power under section 428 can be exercised by the Appellate Court while hearing the appeal against conviction or acquittal. It does not contemplate any challenge to the conviction or sentence, but only reduces the liability of the accused under the sentence.

. The proper procedure for claiming this benefit, therefore, would be a miscellaneous application by the accused to the Court at any time while the sentence runs, for passing an appropriate order for reducing the term of imprisonment according to the section. Therefore, the application filed by the applicant/convict deserves to be allowed.

9. We are not aware as to whether the co-accused in this case, Subhash Krushna Khot, who is also convict and was detained as under-trial

prisoner has applied for such a relief. Even if he has not done so while considering this application, we also direct the benefit to be extended to the co-accused in this case. It appears that while passing the operative part of the judgement, the learned P.P. appearing for the state as well as the learned advocate appearing for the respondents failed to point out to the court of having not granted set off to the respondents while convicting the accused which they are entitled under section 428 of the Cr.P.C.

10. Therefore, we hold that the applicant and the co-accused are entitled for set off for the period they were in custody during trial i.e. from the date of their arrest i.e.14.7.86 till 3.9.87 when they came to be acquitted by the trial court.

11. We therefore, direct the respondents to calculate the period of their imprisonment by giving the set off of the aforesaid period. Petition stands disposed of accordingly. Rule absolute on the aforesaid terms.

(SHRI J.N. PATEL, J)

(SMT.ROSHAN DALVI, J)